

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

TRINITY SERVICES GROUP, INC.

and

Case 28-CA-212163

**UNITED FOOD AND COMMERCIAL
WORKERS UNION, LOCAL 99**

**GENERAL COUNSEL'S ANSWERING BRIEF
TO RESPONDENT'S EXCEPTIONS**

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I. INTRODUCTION¹

In a Complaint issued on March 30, 2018, the Regional Director of Region 28 of the National Labor Relations Board (the Board) alleged that Trinity Services Group, Inc. (Respondent) through its supervisors violated Section 8(a)(1) of the National Labor Relations Act (the Act) by informing its employees that collective bargaining by and between Respondent and the Union would be futile, interrogating employees about their union membership, activities, and sympathies, and disparaging the Union as the bargaining representative of its employees. On November 7, 2018, Administrative Law Judge John T. Giannopoulos (the ALJ) issued a decision and recommended order finding that Respondent had violated the Act by interrogating employees about their union and protected concerted activities and by disparaging United Food and Commercial Workers Union, Local 99 (the Union), including by telling employees that the Union was responsible for creating problems with their paid-time-off (PTO). ALJD 12-13; 15. Respondent excepts to the ALJ's findings that Respondent interrogated its employees and that Respondent disparaged the Union. R. Exceptions Brief 2.

As explained below, the ALJ's findings that Respondent acted unlawfully by interrogating employees and disparaging the Union are well-supported by the facts and the law. Accordingly, Counsel for the General Counsel respectfully requests that the Board deny Respondent's exceptions and issue an Order requiring Respondent to provide a full and complete remedy including the posting of notices to employees.

¹ References to the trial transcript will be denoted by "Tr. [page number]." References to the General Counsel's exhibits will be denoted by "GC Ex. [page number]." References to Respondent's Brief in Support of its Exceptions will be denoted as "R. Exceptions Brief [page number]." References to the Judge's Decision will be denoted as "ALJD [page number: line number]."

II. STATEMENT OF THE CASE

Respondent provides institutional food services at correctional facilities. GC 1(e). Respondent has a contract with a state prison in Douglas, Arizona. Respondent has about eighteen salaried and hourly compensated employees. Tr. 19-20. The correctional facility houses about 1,800 inmates. Tr. 21. Respondent's employees oversee inmates who prepare food for the facility. Tr. 156.

The employees at Respondent's Douglas facility are unionized. Tr. 21, 26. The Union represents all full-time and regular part-time foodservice aides, warehouse aides and drivers employed by Respondent at the Douglas, Arizona correctional facility. GC 3. Respondent and the Union have been negotiating a new contract for the last year. Tr. 21, 26. The previous contract expired on June 30, 2017. Tr. 21; GC 3. There have been multiple bargaining sessions since then. Tr. 22.

Respondent and the Union have been negotiating a new contract for the last year. Tr. 21, 26. The previous contract expired on June 30, 2017. Tr. 21; GC 3. There have been multiple negotiations for a new contract since then. Tr. 22.

Since early 2017, Respondent and the Union have had a disagreement about paid time off (PTO). Tr. 22, 27, 33. PTO was a major point of contention in successor contract bargaining. Tr. 114. Respondent and the Union disagree with how PTO is accrued per the collective-bargaining agreement and when it expires. Tr. 33, 34. Grievances have been filed by the Union on the issue, and, in June 2017, the Union informed Respondent that they would be submitting a grievance, related to PTO in December 2016, to arbitration. Tr. 33. GC 6. In December 2017, the Union submitted another grievance regarding the PTO. Tr. 56. The grievance is still pending. Tr. 59.

Luna is Respondent's Assistant Food Service Director. Tr. 15. He supervises all of Respondent's employees and managers. Tr. 15. Puentes is the company's Food Service Director. Tr. 19. Rivera is Respondent's Unit Manager. Tr. 25. He supervises employees, makes their schedules, gives employees requested vacations, and solves problems in the kitchen. Tr. 26. Frank Romero (Romero) is Respondent's Office Manager. Tr. 83, 159. His work involves accounting, answering the phone, and paying the company's bills. Tr. 159.

Marisol Victoria is a Food Supervisor at Respondent's Douglas facility. Tr. 33. Last year she was supervised by Rivera. Tr. 74. Victoria reports to Luna as well. Tr. 76. She is an active union member and has been a member of the Union for about five and half years. Tr. 74. Victoria attended about three bargaining meetings with the Union between May and December 2017. Tr. 40, 75, 92. These meetings involved the negotiations for a new contract between the Respondent and the Union. Tr. 75. Jose Pedrego works as a truck driver for Respondent. Tr. 103. He also serves his fellow employees as a shop steward. Tr. 41, 104. In this role his coworkers come to him with issues they have in the workplace and he relays them to the Union. Tr. 104.

On August 14, 2017, Puentes violated Section 8(a)(1) of the Act by questioning Victoria about how much she paid in union dues. ALJD 12-13. On December 15, 2017, Rivera violated Section 8(a)(1) of the Act by blaming the Union for lost PTO.

III. ARGUMENT AND ANALYSIS

A. THE ALJ APPROPRIATELY CREDITED VICTORIA'S TESTIMONY OVER THAT OF PUENTES AND RIVERA

One of the Board's most basic and most often-cited principles is the principle that the Board will give great deference to an administrative law judge's credibility findings and will only overrule them if the clear preponderance of all the relevant evidence demonstrates that they are incorrect. *Standard Drywall Products*, 91 NLRB 544, 545 (1950), *enfd.* 188 F.2d 362 (3d

Cir. 1951). The Board defers to administrative law judges' credibility findings because "the demeanor of witnesses is a factor of consequence in resolving issues of credibility" and because administrative law judges "hav[e] the advantage of observing the witnesses while they testif[y]." *Id.* Thus, "the final determination of credibility rests with the [administrative law judge] as long he considers all relevant factors and sufficiently explains his credibility resolutions." *NLRB v. Armcor Industries, Inc.*, 535 F.2d 239, 241 n. 3 (3d Cir. 1976). In applying this deferential standard, the Board whether the administrative law judge's credibility resolutions are inconsistent with "the weight of the evidence, established or admitted acts, inherent probabilities, and reasonable inferences drawn from the record as a whole." *Stevens Creek Chrysler Jeep Dodge, Inc.*, 357 NLRB 633, 635 (2011).

The parties involved differ on their accounts of what happened on the two dates in question. ALJD 9. The ALJ noted the inconsistencies in Puentes and Luna's testimony. ALJD 9. He also stated that Rivera was not a credible witness because his testimony kept changing regarding the issue of PTO. ALJD 14. The ALJ was right to credit Victoria's testimony over that of Luna, Puentes, and Rivera. In making his determination, the ALJ relied on the witnesses' demeanor. *Id.* In addition, he noted in his decision that Victoria's credibility was supported by the fact that she was testifying against her pecuniary interest as a current employee of Respondent. *Id.* This position is supported by case law stating that administrative law judges may take into consideration the reality that testimony of current employees "is apt to be particularly reliable," since such witnesses are testifying against their pecuniary interests, in that they are dependent on their employer for their livelihoods." *Gold Standard Enterprises*, 234 NLRB 618, 619 (1978), enf. denied 607 F.2d 1208 (7th Cir. 1979); see also *Flexsteel Industries*, 316 NLRB 745, 745 (1995); *Gateway Transportation Co., Inc.*, 193 NLRB 47, 48 (1971); *Federal Stainless*

Sink Division of Unarco Industries, Inc., 197 NLRB 489, 491 (1972). Thus, to the extent Respondent seeks to call into question the ALJ's credibility resolutions when it refers to the credited testimony of Victoria as "claims" throughout its brief, Respondent's suggestion that Victoria's testimony was not credited or was not credible should be rejected.

**B. THE ALJ APPROPRIATELY FOUND THAT RESPONDENT
UNLAWFULLY INTERROGATED ITS EMPLOYEES ABOUT
THEIR UNION MEMBERSHIP, ACTIVITIES, AND SYMPATHIES**

As noted by Respondent, the familiar test for evaluating whether an interrogation violates Section 8(a)(1) is considering "whether under all the circumstances the interrogation reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act." *Rossmore House*, 269 NLRB 1176, 1177-78, 1178 fn. 20 (1984), citing *Bourne v. NLRB*, 332 F.2d 47 (2d Cir. 1964). Relevant factors include: (1) the background, i.e. is there a history of employer hostility and discrimination; (2) the nature of the information sought -- did the interrogator appear to be seeking information on which to base taking action against individual employees; (3) the identity of the questioner, i.e. how high was he in the company hierarchy; (4) the place and method of interrogation, e.g. was employee called from work to the boss's office, and whether there an atmosphere of unnatural formality; and (5) the truthfulness of the employee's reply to the questioning. *Medcare Associates, Inc.*, 330 NLRB 935, 939 (2000).

On August 14, 2017, Respondent, through its supervisor Puentes, brazenly and unlawfully interrogated Victoria about her union activities and protected concerted activities. Specifically, after Luna criticized the Union, suggesting that the Union was doing nothing for employees and that the money employees paid to the Union was wasted, Victoria deflected, saying, essentially, "It is what it is." ALJD 8:10-14. However, Puentes still pressed, directly questioning Victoria, two-on-one, about whether Respondent's employees were paying fees to

the Union. ALJD 8:16-17. Luna and Puentes then continued their criticism, saying the money paid to the Union was being thrown away, suggesting that Victoria should instead give her money to them, and then laughing. ALJD 8:17-20.

The circumstances surrounding Puentes' questioning made the questioning coercive. The questioning occurred in the context of unsettled successor contract bargaining, and it immediately followed Respondent's explicit criticism of the Union and questioning of its effectiveness in bargaining. The question was specifically aimed at getting information about the level of employee support during this bargaining. Moreover, it was conducted two-on-one by Puentes a high-level management official, and Luna, Respondent's highest day-to-day official at the jobsite. ALJD 12:35-36. Neither Puentes nor Luna conveyed a legitimate purpose for their questions, nor did they provide Victoria with assurances against reprisals. ALJD 12:36-39. In response to Respondent's criticism and questioning, Victoria was reserved and clearly sought to avoid engaging in a dialogue about her own sentiments or those of other employees. Though she testified she laughed "in a way" during the exchange, it is clear that her laugh was out of fear of reprisals and not as a result of her finding anything that was said to be humorous. ALJD at 13 n. 20. Contrary to the Respondent's assertion, there is no record evidence that Victoria was an open and active union supporter. ALJD at 13:17-19. As noted by the ALJ, Victoria was not a Union steward, and there is no evidence that she was a member of the Union's bargaining committee, or that the Union even had a bargaining committee. *Id.* Taking all of these relevant factors into account, the ALJ correctly held that Respondent violated Section 8(a)(1) of the Act by interrogating Victoria as to whether employees were paying dues or fees to the Union. ALJD 12:6-13:8.

**C. THE ALJ APPROPRIATELY FOUND THAT THAT
RESPONDENT UNLAWFULLY DISPARAGED THE UNION AS
THE BARGAINING REPRESENTATIVE OF ITS EMPLOYEES**

The ALJ noted in his analysis that words of disparagement are unlawful when they threaten reprisals or promise of benefits, or when, in context, they have a reasonable tendency to interfere, restrain, or coerce employees in the exercise of their Section 7 rights. *Children's Center for Behavioral Development*, 347 NLRB 35, 36 (2006); see also *Turtle Bay Resorts*, 353 NLRB 1242, 1278 (2009), incorporated by reference 355 NLRB 706 (2010), *enfd.* 452 Fed.Appx. 433 (5th Cir. 2011).

On December 15, 2017, Respondent unlawfully disparaged the Union by blaming the Union for an error in Victoria's PTO or her loss of PTO time. Specifically, when Victoria realized that Respondent's records reflected that she had no PTO time, even though she had accrued PTO time, she alerted supervisors Romero and Rivera, and Rivera said that it was a problem the Union created that that she would need to fix it with the Union. ALJD 9:11-14. Although Respondent asserts that there was a general lack of hostility, the record evidence shows that there was a long-running dispute regarding PTO and how it was calculated and earned. R. Exceptions Brief 15; Tr. 22, 32-36, 56-61, 67-68; GC. 6, 14. There was also a problem relating to how PTO was displayed on employees' pay checks and time cards versus Respondent's computer system. ALJD 15:36-38. Rivera testified to knowing there were issues regarding PTO. Tr. 26, 144-147. Victoria testified to having been denied two days of PTO. Tr. 84. Moreover, there is no evidence establishing that, as Rivera represented to Victoria, the Union caused problems with PTO generally or Victoria's error in PTO specifically. ALJD 15:40-42. Given this context, from the standpoint of employees, Rivera's comments blaming the Union for creating the PTO problem and telling Victoria to fix the problem with the Union violated Section

8(a)(1) of the Act. *Webco Industries, Inc.*, 327 NLRB 172, 173 (1998), *enfd.* 217 F.3d 1306 (10th Cir. 2000); *Faro Screen Process, Inc.*, 362 NLRB No. 84 slip. op. at 1–2 (2015) (citing *RTP Co.*, 334 NLRB 466, 468, 470–71 (2001)); *Westminster Community Hospital, Inc.*, 221 NLRB 185, 193 (1975), *enfd.* in relevant part 566 F.2d 1186 (9th Cir. 1977).

IV. CONCLUSION

Based on the foregoing, the General Counsel respectfully requests that the Board deny Respondent’s Exceptions, adopt the portions of the Administrative Law Judge’s decision and recommended order to which Respondent excepts, and order a full and complete remedy including the posting of notices to employees at Respondent’s facility.

Dated at Phoenix, Arizona this 19th day of December, 2018.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of **GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS** in *Trinity Services Group, Inc.*, Case 28-CA-212163, was E-Filed and served by E-mail on this 19th day of December, 2018, on the following:

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